Circuit Court for Prince George's County
Case No. CAEF16-38334

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 3423

September Term, 2018

DAMON MOATS

v.

CARRIE M. WARD, et al.

Nazarian,
Beachley,
Shaw Geter,
JJ.

Opinion by Beachley, J.

Filed: March 10, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On December 27, 2018, the Circuit Court for Prince George's County ratified the foreclosure sale of property previously owned by appellant, Damon Moats. Appellant timely noted an appeal and presents three issues for our review:

1. Whether the [c]ourt abused its discretion when it determined that good cause did not exist for [a]ppellant's late filing of his motion to dismiss or stay challenging the standing of Plaintiffs to bring an action where [a]ppellant did not receive the evidence necessary to make his claims until after his filing deadline had passed?

2. Whether the [c]ourt error [sic] in denying [a]ppellant's Motion to Stay or Dismiss and finding that [a]ppellees were entitled to enforce a lost note under [Md. Code (1975, 2013 Repl. Vol.), §§ 3-301, -309 of the Commercial Law Article ("CL")] where the lost note was payable to another party, did not contain any indorsements, and [a]ppellees failed to put forth any reliable evidence showing that they were in possession of and entitled to enforce the note when it was lost.

3. Whether the [c]ourt erred in finding that the Substitute Trustees were properly appointed where there is no evidence that the note was ever transferred, and the substitute trustees were allegedly appointed by the servicer for the alleged secured party who has not shown they were entitled to enforce the note.

We conclude that the circuit court did not abuse its discretion in determining that appellant lacked good cause for filing his untimely motion to dismiss. Even if the motion were timely, we would conclude that the court correctly determined that the Substitute Trustees were properly appointed and were therefore permitted to enforce the promissory note by initiating the foreclosure in this case.

FACTS AND PROCEEDINGS

On August 1, 2003, appellant executed a promissory note (the "Note") in favor of GreenPoint Mortgage Funding, Inc. ("GreenPoint") for $267,200 to purchase property at 11929 Autumnwood Lane in Fort Washington, Maryland (the "Property"). The Note was

secured by a Deed of Trust, executed the same day, to Greenpoint. The Note itself provided that it could be sold without prior notice to the borrower, and that such an event would change the loan servicer or entity responsible for collecting payments. The Deed of Trust further provided that Mortgage Electronic Registration Systems, Inc., ("MERS") would act as a nominee for Greenpoint and Greenpoint's successors and assigns, and that MERS was a beneficiary under the instrument.[1] According to an affidavit provided by OCWEN Loan Servicing, LLC ("OCWEN"), on August 1, 2003, the same day the Note was executed, Greenpoint placed the Note into a securitization trust, whereby The Bank of New York Mellon, f/k/a the Bank of New York, as Trustee for Greenpoint Mortgage Securities Inc. GreenPoint Mortgage-Backed-Pass-Through Certificates Series 2003-1 (the "Trust") obtained ownership of the Note.

Nearly thirteen years later, on May 9, 2016, OCWEN, the servicer for the Trust, sent appellant a Notice of Intent to Foreclose, claiming that appellant defaulted on the Note on August 2, 2010. On October 10, 2016, OCWEN appointed, on behalf of the Trust, appellees as Substitute Trustees, and the following day the Substitute Trustees filed an Order to Docket in the Circuit Court for Prince George's County. According to the docket entries, the parties participated in mediation on February 21, 2017, but did not reach an agreement. Accordingly, on March 2, 2017, the circuit court issued an order stating that the Substitute Trustees could schedule the foreclosure sale, subject to appellant's right to

[1] For a discussion of the securitization process and MERS, see *Anderson v. Burson*, 424 Md. 232, 237-38 (2011).

file a motion pursuant to Maryland Rule 14-211 to stay the sale or dismiss the action.

In November of 2017, appellant sent OCWEN a "Qualified Written Request," in which appellant requested various documents. According to appellant, in response to this document request, "on January 9, 2018, [OCWEN] produced certain documents." Of particular relevance, OCWEN produced a lost note affidavit ("LNA") from Countrywide Home Loans, Inc., ("Countrywide") dated March 30, 2010, wherein a Countrywide Officer asserted that the original Note appellant executed on August 1, 2003, and securing the Property, was made payable to Countrywide,[2] but had been lost and could not be recovered.

On February 28, 2018, appellant filed a motion to stay or dismiss the foreclosure proceeding, arguing that the Countrywide LNA discredited the Substitute Trustees' assertion that they represented the owner of the Note and could therefore foreclose on the Property. The Substitute Trustees filed an opposition on March 15, 2018. On April 4, 2018, the circuit court held a hearing on appellant's motion to stay or dismiss the sale and other related filings, and took the matter under advisement. In a memorandum and order dated April 30, 2018, the circuit court denied appellant's motion. In its Memorandum and Order of Court, the circuit court found that appellant's motion was not timely filed, and that appellant failed to show good cause to excuse the late filing. The court further concluded that, based on their filing, the Substitute Trustees were entitled to foreclose on

[2] We shall discuss the significance of the Countrywide LNA in detail below, but simply note here that the original Note and the accompanying Deed of Trust indicated that the Note was made payable to Greenpoint—not to Countrywide. Indeed, except for the Countrywide LNA, there is no evidence that Countrywide was ever an owner or secured party.

the Property. The sale proceeded, and on October 23, 2018, the Trust purchased the Property. The circuit court ratified the sale on December 27, 2018, and appellant timely appealed.

STANDARD OF REVIEW

The parties agree that when a borrower files a motion to stay the sale of property or dismiss a foreclosure action, the borrower seeks injunctive relief by challenging the lender's right to foreclose. *Bates v. Cohn*, 417 Md. 309, 318-19 (2010); *see also Hobby v. Burson*, 222 Md. App. 1, 8 (2015). "The grant or denial of injunctive relief in a property foreclosure action lies generally within the sound discretion of the trial court." *Anderson v. Burson*, 424 Md. 232, 243 (2011) (citing *Wincopia Farm, LP v. Goozman*, 188 Md. App. 519, 528 (2009)). An abuse of discretion occurs when the decision under review is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *Eastside Vend Distribs., Inc. v. Pepsi Bottling Grp., Inc.*, 396 Md. 219, 239 (2006) (quoting *Dehn v. Edgecombe*, 384 Md. 606, 628 (2005)). Accordingly, we review for an abuse of discretion the circuit court's decision to deny appellant's motion to stay or dismiss the foreclosure proceeding.

DISCUSSION

Maryland Rule 14-211 governs motions to stay a sale or dismiss a foreclosure action. It provides, in relevant part:

> (a) (2) (A) In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall be filed no later than 15 days after the last to occur of:
> (i) the date the final loss mitigation affidavit is filed;
> (ii) the date a motion to strike postfile mediation is granted; or

> (iii) if postfile mediation was requested and the request was not stricken, the first to occur of:
>
> (a) the date the postfile mediation was held;
>
> (b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or
>
> (c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.
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> * * *
>
> (C) For good cause, the court may extend the time for filing the motion or excuse non-compliance.

In its Memorandum and Order of Court, the circuit court found that appellant's "motion was not timely filed pursuant to Md. Rule 14-211(a)(2)(A)(iii)(a) nor was good cause shown to excuse the delay." We agree with the circuit court that appellant's motion was not timely filed. Mediation occurred on February 21, 2017, but appellant did not file his motion until February 28, 2018—more than a year later. Because the Rule requires the borrower to file a motion to stay within 15 days of mediation, appellant's motion was clearly untimely.

We further conclude that appellant failed to show good cause to excuse his untimely motion. Recognizing that Rule 14-211 does not define the term "good cause," appellant argues that he only received the Countrywide LNA on January 9, 2018—nearly a year after the February 21, 2017 mediation. In arguing the existence of good cause, appellant states:

> To affirm the [c]ircuit [c]ourt's ruling that [appellant] did not have good cause to file his motion even though he was not in possession of the necessary evidence until after the filing deadline is not only inequitable, but would incentivize plaintiffs to conceal evidence until after the fifteen-day period had run[. . . .]

Even were we to assume that appellant's January 9, 2018 receipt of the Countrywide LNA extended the time for filing the motion to stay, appellant did not file his motion until February 28, 2018. Although Rule 14-211 does not mention the time for filing a motion to stay upon receiving what appellant refers to as the "necessary evidence," the spirit of the rule—which appellant acknowledges in his brief—contemplates a fifteen-day deadline. Appellant filed his motion approximately six weeks, rather than fifteen days, after receiving his "necessary evidence." Given appellant's delay in filing his motion, we cannot conclude that the circuit court abused its discretion in declining to find good cause for the late filing. That appellant lacked good cause is bolstered by our determination, discussed *infra*, that the Countrywide LNA—the sole basis for appellant's motion—was obviously inaccurate. Accordingly, the circuit court did not abuse its discretion in implicitly disregarding the significance of the Countrywide LNA when it found that appellant lacked good cause to excuse his untimely motion.

Even assuming appellant's motion were timely, however, we would still affirm. Appellant claims that the Substitute Trustees were not entitled to enforce the Note because they have not shown: (1) that they were in possession of the Note when it was lost, and (2) that they were entitled to enforce the Note at the time it was lost. We reject both of these arguments.

In *Svrcek v. Rosenberg*, 203 Md. App. 705, *cert. denied* 427 Md. 610 (2012), this Court addressed whether substitute trustees who were not in possession of a note were nevertheless entitled to enforce it as persons not in possession. There, on November 4, 2005, Svrcek executed a promissory note in favor of Taylor, Bean & Whitaker Mortgage

Corp. ("TBWMC") to refinance property, where the note was secured by a Deed of Trust also in favor of TBWMC. *Id*. at 709. On or before June 1, 2006, Svrcek's note was either sold or transferred into a trust, with Citibank, N.A. as trustee and EMC Mortgage Corporation as servicer. *Id*. at 709-10.

"On or about July 31, 2009, Svrcek received a notice of intent to foreclose on his property." *Id*. at 710. The notice identified TBWMC as the original lender, EMC Mortgage Corporation as the servicer, and Citibank, N.A., trustee for the trust, as the secured party. *Id*. Approximately two months later, on October 8, 2009, Rosenberg and other substitute trustees filed an order to docket. *Id*. at 711. A week later, on October 15, 2009, however, the circuit court entered a memorandum order stating that the foreclosure sale could not occur until two deficiencies in the order to docket were cured. *Id*. at 714. First, the affidavit regarding the notice of intent to foreclose needed to include the original return receipt and a statement that the requirements of § 7-105.1(c)(2)(i) and (ii) of the Real Property Article were met. *Id*. Second, and relevant to the instant case, the court required the substitute trustees to provide: "The *recorded* original or a certified copy of the assignment of the mortgage/deed of trust and/or certified copy of assignment of note" from TBWMC to EMC Mortgage Corporation as attorney in fact for Citibank, N.A., the trustee of the trust. *Id*.

The substitute trustees responded that "they 'were awaiting a copy of the recorded assignment from the land records,' and that a 'copy of the recorded assignment'" would be filed with its response. *Id*. at 715. The substitute trustees then filed "a photocopy of an assignment of a deed of trust executed on October 22, 2009, and filed in the circuit court

on October 30, 2009," wherein TBWMC assigned the deed of trust to EMC Mortgage Corporation as attorney in fact for Citibank, N.A., trustee. *Id*. at 715-16.

Like appellant in the instant case, Svrcek filed a motion to stay the sale and dismiss the proceedings[3] on the basis that Citibank, N.A., trustee, did not own his note and did not have the authority to appoint substitute trustees. *Id*. at 716. Svrcek further argued that the October 22, 2009 assignment from TBWMC to Citibank, N.A., trustee, was not valid because Citibank, N.A., trustee, was not the secured party on October 8, 2009, when the substitute trustees filed the order to docket. *Id*. The substitute trustees responded that the note was transferred to Citibank, N.A., trustee, on April 3, 2006, and that the original note was in a document vault belonging to EMC Mortgage Corporation. *Id*. at 717. On January 29, 2010, the property was sold at public auction to Citibank, N.A., trustee. *Id*.

Although the substitute trustees asserted that the original note was in a vault belonging to EMC Mortgage Corporation, at a motions hearing on February 23, 2010, they produced a lost note affidavit asserting that: 1) the original note was dated November 4, 2005; 2) the original note was lost, but a copy was attached; 3) the holder of the note was EMC Mortgage Corporation as attorney in fact for Citibank, N.A., as trustee of the trust; and 4) that the note was in default. *Id*. at 718. Following that hearing, Svrcek moved to "vacate a void sale" and dismiss the foreclosure, requesting the court to strike the lost note affidavit and require the substitute trustees to produce the original note. *Id*. Svrcek further

[3] In a footnote, this Court clarified that Svrcek erroneously moved to vacate the sale despite the sale having not yet occurred. *Svrcek*, 203 Md. App. at 716 n.7. Instead, Svrcek's motion was treated as a motion to stay or dismiss the foreclosure proceedings. *Id*.

claimed that the substitute trustees lacked standing to initiate the foreclosure action. *Id*. The circuit court denied Svrcek's motion, and Svrcek appealed. *Id*. at 718-19.

On appeal, we held that Svrcek "failed to state a legitimate defense to the validity of the lien or the lien instrument and the right of [the substitute trustees] to foreclose." *Id*. at 722. Regarding Svrcek's argument that the substitute trustees failed to prove possession of the note, we stated that, pursuant to CL § 3-301, a person entitled to enforce a negotiable instrument means: "(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder [*i.e.*, a transferee], or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 3-309[.]" *Id*. 724 (alteration in original) (quoting *Anderson*, 424 Md. at 246-47). We noted that Citibank, N.A., trustee, failed to establish that it was a *holder* of the note, but concluded that it did establish that it was a person not in possession of the instrument who was entitled to enforce pursuant to CL § 3-309. *Id*.

Commercial Law § 3-309 provides:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> (b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, § 3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that

> might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

In holding that the substitute trustees satisfied the requirements of CL § 3-309, we noted that they attached: a certified true copy of the note; an affidavit of ownership wherein they certified that EMC Mortgage Corporation as attorney in fact for Citibank, N.A., trustee, was the owner of the note; and a certification pursuant to Md. Rule 14-207 that the note was a "true and accurate copy" of the note delivered "by the note holder and/or its servicing agent." *Id*. at 725. We also noted that Svrcek never denied that the copy of the note was indeed a copy of the note he executed at settlement, nor did he ever allege that any party other than Citibank, N.A., trustee, through its servicer EMC Mortgage Corporation, had ever contacted him regarding payment. *Id*. We further noted that the deed of trust and note informed Svrcek that the note could be transferred. *Id*. We concluded,

> All of this evidence supports the conclusion that the note was, at some time before June 1, 2006, transferred to Citibank, N.A. as Trustee, which received all the rights to enforce the note that [TBWMC] had. Although Citibank, N.A. as Trustee was the owner of the note, the note was, at some point, lost. Thus, Citibank, N.A. as Trustee became a person not in possession of the note, but who was entitled to enforce it pursuant to CL § 3-309.

Id. at 726.

As in *Svrcek*, we conclude that the Substitute Trustees here were entitled to enforce the Note because they have shown that the Trust meets the requirements of CL § 3-301.

At the outset, we note that although the Countrywide LNA stated that the Note was made payable to Countrywide, that representation was clearly incorrect—the Note itself expressly states that "The lender is [Greenpoint]." Although it is possible that Countrywide

acted as a servicer for the Trust, the evidence undermines the notion that Countrywide ever actually *owned* the Note. This is further supported by the fact that, on April 8, 2016, OCWEN filed its own LNA wherein it asserted that the Trust had owned the Note since August 1, 2003.

Disregarding the false LNA from Countrywide, the record clearly shows that the Trust has owned the Note since its execution on August 1, 2003. The OCWEN LNA correctly asserted that the original payee of the Note was Greenpoint. The OCWEN LNA further states that: the Trust obtained ownership of the Note on August 1, 2003, the day the Note was executed, and remains the current owner of the Note; that, despite a good faith search, the Note was lost; and that records indicated it was never satisfied or assigned to another party. Furthermore, the OCWEN LNA explained that OCWEN was the servicer for appellant's loan.

In addition to the OCWEN LNA, the affidavit certifying ownership in the Order to Docket corroborates the fact that the Trust owned the Note. A document titled "Corporate Assignment of Deed of Trust" attached to the affidavit certifying ownership states that on August 1, 2016, a corrective assignment of the Deed of Trust was recorded in the land records for Prince George's County to reflect that MERS, as nominee for Greenpoint, its successors and/or assigns, had previously assigned the Deed of Trust to the Trust, with the Bank of New York as trustee. Furthermore, the Substitute Trustees' Order to Docket contained an affidavit certifying the Trust's ownership of the Note, verifying that OCWEN was the servicer on behalf of the Trust, and indicating that OCWEN had appointed the Substitute Trustees to proceed with foreclosure proceedings. The Substitute Trustees also

produced a copy of the original Note showing Greenpoint as the original lender. Additionally, we note that appellant has never disputed that he defaulted on the Note, or that a party other than the Trust (through its servicer) claimed ownership of the Note.[4]

The OCWEN LNA and the affidavit of ownership filed with the Order to Docket clearly satisfy the requirements of CL § 3-309. The documents show that the Trust: 1) obtained ownership of the Note on August 1, 2003, and was entitled to enforce it when loss occurred; 2) that the loss was not a result of a transfer, assignment, or "lawful seizure" as set forth in CL § 3-309; 3) and that the trustee could not reasonably obtain possession of the instrument because it had been lost or destroyed.

As in *Svrcek*, "At no time did [appellant] ever deny that the copy of the [Note] was, in fact, a copy of the note that he executed at settlement on the [Property]. Nor did [appellant] ever claim that anyone other than [the Trust], through its servicer . . . had ever contacted him regarding payments due on the loan." *Id*. at 725. With the exclusion of the clearly false Countrywide LNA, all evidence in the record indicates that the Trust has continuously owned the note since August 1, 2003. We therefore conclude that the Substitute Trustees were entitled to foreclose on the Property on behalf of the Trust.

Finally, we summarily reject appellant's argument that the Substitute Trustees were not properly appointed and therefore lacked authority to file the foreclosure action. In his

[4] Indeed, aside from mentioning that "the lost note was payable to another party" in his "Questions Presented," appellant never asserts in his brief that Countrywide was the actual owner of the Note. Instead, the bulk of appellant's argument simply urges us to adopt out-of-state authority construing the Uniform Commercial Code.

brief, appellant argues that, pursuant to the Deed of Trust itself, only the lender was authorized to substitute a trustee. As stated above, Paragraph 20 of the Deed of Trust expressly allows the appointment of a new servicer in the event of a sale of the Note. The Deed of Trust further states, "There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note." Here, at some point, the Bank of New York, the trustee for the Trust and beneficiary of the Deed of Trust, appointed OCWEN as servicer of the Note, and OCWEN, acting for the trustee, subsequently appointed the Substitute Trustees to handle the foreclosure proceedings. We see no error in that procedure.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.